

Luong (Migration) [2018] AATA 3653 (1 August 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Quoc Toan Luong
CASE NUMBER:	1617662
DIBP REFERENCE(S):	CLF2013/228342
MEMBER:	Amanda Mendes Da Costa
DATE:	1 August 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2)(c) of Schedule 2 to the Regulations

Statement made on 01 August 2018 at 10:26am

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – Genuine and continuing relationship – Pooling of financial resources – Joint credit card debt – Reliance on sponsor’s mother – Photographs of social events – Wedding ceremony – Applicant’s behaviour – Decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), Schedule 2 cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 October 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 16 September 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter, the primary criteria include cl.801.221.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied that the applicant was in a genuine and continuing relationship with the sponsor.
4. The delegate found that based on the limited information provided, there appeared to be neither commitment nor progression of the relationship since its beginning. The delegate was further not satisfied that the applicant and sponsor provided each other with companionship or that they drew any emotional support from each other, which would be reasonable to expect and demonstrated from a couple claiming to have been married since 18 August 2013.
5. The applicant seeks review of the delegate's decision and for that purpose provided a copy of the primary decision to the Tribunal.
6. The applicant appeared before the Tribunal on 27 July 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Ms Nga Thuy Dinh.
7. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.

Whether the parties are in a spouse or de facto relationship

10. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen, who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

11. The Tribunal also notes that the sponsor acquired Australian citizenship by grant on 30 April 1997. A copy of the sponsor's citizenship certificate dated 30 April 1997 was provided to the Tribunal and it accepts this as genuine.
12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F (2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household, and their commitment to each other as set out in r.1.15A (3), which is extracted in the attachment to this decision.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties married at Braybrook, Victoria on 18 August 2013. A copy of a marriage certificate dated 11 September 2013 was provided to the Department and the Tribunal accepts this document as genuine. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

14. The financial aspects of the relationship

15. The Tribunal is required to consider all the circumstances of the financial aspects of the relationship.
16. The parties provided the Tribunal with a copy of a statement of their joint bank account for the period August 2015 to 30 September 2017. This statement shows deposits and withdrawals consistent with the joint use of the account of the couple for the day-to-day expenses of a couple living together and pooling their financial resources.
17. The parties explained to the Tribunal that that they had previously operated a joint credit card. However, during a period of unemployment in 2017, the applicant Mr Luong had spent several thousand dollars after withdrawing money from the joint account and obtaining cash withdrawal using the credit card. Unbeknown by Ms Dinh at the time, this money was used by Mr Luong for social activities with friends. When she discovered her husband's spending, Ms Dinh cancelled their joint credit card and the parties closed their joint savings account. Ms Dinh subsequently assumed sole responsibility for management of the couple's financial affairs. Mr Luong obtained further employment in late 2017 and is still employed in that position. The parties explained that their salaries are now paid into separate accounts. Ms Dinh retains possession and control of Mr Luong's ATM card and she controls the withdrawal of any amounts from his account. She pays him a weekly allowance for his personal expenses and assists her mother with household expenses, with contributions from both her own funds and that of her husband.
18. The Tribunal has been provided with a statutory declaration from Ms Dinh's mother, Ms Thi Thu Le, dated 15 August 2016. In this declaration, Ms Le attests to the parties' financial arrangements with her regarding the payment of household expenses. She explains that the parties do not pay any rent and are not responsible for the utilities accounts, which are in her name. However, they do assist her with the cost of groceries for the household. The

Tribunal accepts this evidence which is consistent with the oral evidence of Mr Luong and Ms Dinh.

19. Although the Tribunal finds evidence that the parties have pooled their financial resources in relation to day-to-day expenses, it does not find any such pooling of financial resources in relation to major financial commitments. Moreover, the Tribunal finds no evidence that the parties have acquired joint ownership of real estate or other major assets; and no evidence that the parties presently have any joint liabilities. It does find, however, that the parties previously had a credit card debt in respect of their joint account, which they have now repaid. The Tribunal finds that neither person in the relationship owes any legal obligation in respect of the other.

20. The Tribunal attaches some weight to the financial aspects of the relationship.

21. The nature of the household

22. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.
23. The parties have no children and therefore the Tribunal finds that they have no joint responsibility for the care and support of children. The Tribunal is satisfied that they have lived together since their marriage in August 2013. For the past four years they have been living together with Ms Dinh's mother at the home of the sponsor's sister.
24. The parties rely on Ms Dinh's mother for shopping, cooking and housework for the members of the household. On weekends the parties provide some assistance to Ms Dinh's mother, but this is not a significant or necessarily shared contribution to the upkeep of the household.
25. Accordingly the Tribunal attaches little weight to the household aspects of the relationship.

26. The social aspects of the relationship

27. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
28. In their oral evidence, the parties told the Tribunal that they spend most of their spare time watching Vietnamese television programs. Mr Luong is also an avid fan of soccer. The parties have made occasional outings to Phillip Island and the Mornington Peninsula and visit a local shopping centre on weekends. Apart from family members, the parties have few mutual friends but sometimes socialise with a friend of Mr Luong and his family. They also took a holiday together to Vietnam in November 2016.
29. The Tribunal has further considered a bundle of photographs depicting the parties alone and with members of Mr Luong's family during their trip to Vietnam. These photographs appear to the Tribunal to be genuine.
30. The Tribunal notes that Ms Dinh's family (including her mother and siblings) and Mr Luong's aunt, attended their wedding ceremony in August 2013, and Mr Luong's mother travelled to Australia from Vietnam in February 2014 for the parties' wedding party, which was held at a Melbourne restaurant, with approximately 50-60 guests.

31. The Tribunal accepts that the above evidence demonstrates that the parties have represented themselves to family and friends as a couple and that they continue to do so at the time of this decision.
32. Accordingly, the Tribunal attaches significant weight to the social aspects of the relationship.
33. *The nature of the persons' commitment to each other*
34. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see the relationship as a long term one are all aspects to be considered in determining the nature of the persons' commitment to each other.
35. The Tribunal has considered a number of statutory declarations provided to it by the parties. These declarations attest to the genuine and continuing nature of the parties' relationship. In his declaration, for example, Mr Lan Thi Le (a friend of the applicant) attests to seeing the applicant two to three times each week and having observed the development of Mr Luong's relationship with Ms Dinh over several years. In the absence of evidence to the contrary, the Tribunal accepts this evidence as supporting the parties' claim that they are in a genuine and continuing relationship.
36. The Tribunal accepts that Mr Luong's behaviour in 2017, in spending the couple's joint savings on his own social activities caused significant difficulties in the couple's relationship. However, the Tribunal finds that despite these difficulties the couple have remained committed to each other for over seven years and have also overcome the not insignificant trials and tribulations of the initial visa refusal. The parties spoke in a frank and honest manner when describing their feelings for each other. Mr Luong told the Tribunal that his wife was good with paperwork, smart and loving towards her mother. Ms Dinh described her husband as supportive, able to calm her down and kind to her mother (with whom they have lived for several years).
37. Given all the evidence before it, the Tribunal finds that the parties derive considerable companionship and emotional support from each other.
38. Accordingly the Tribunal attaches significant weight to the nature of the persons' commitment to each other.
39. **CONCLUSION**
40. Having regard to all the circumstances of the relationship, the Tribunal is satisfied that when the application was made and at the time of this decision, the applicant and sponsor had a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied that their relationship is genuine and continuing. The Tribunal is satisfied that the applicant and sponsor live together.
41. Given these findings the Tribunal is satisfied that the requirements of s.5F (2) are met at the time of this decision. Therefore the applicant meets cl.801.221(2)(c).
42. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

43. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221(2)(c) of Schedule 2 to the Regulations; and

Amanda Mendes Da Costa
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).